LE COPY

IN THE

Supreme Court of the United States

OCTOBER TERM, A.D. 1959

No. 9[illegible] 124

NORMAN G. ZACHARY and
EDWARD J. ZACHARSKI,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

FRANK E. HOOK,
208 East Coolidge Avenue,
Ironwood, Michigan,
Attorney for Petitioner.

SUBJECT INDEX

	Page
I. Opinions Below	2
II. Jurisdiction	2
III. Questions Presented	2-3
IV. Constitutional Provisions, Statutes, Rules Involved	4-8
Constitutional Provisions	4-5
Criminal Code Provisions	5-7
Rules of Criminal Procedure	7-8
V. Statement of Facts	8-13
Facts Re: Trial and Proceedings	9-11
Facts Re: Question of Unlawful Communication with Jury	11-13
VI. Argument	13-21
The Court of Appeals erred in overlooking a flagrant unlawful communication with the jury in affirming the District Court	13-20
Other Cases and Authority	15-20
The Court of Appeals erred and compounded the error of the District Court in holding in effect that private papers brought in by compulsion or lawful search and seizure can be used to incriminate in violation of the Fifth Amendment of the United States Constitution	21
Conclusion	21-23
Appendix A—Opinion of the Court on Motion to Vacate	25-27
Appendix B—Opinion of Court of Appeals	28-33
Appendix C—Denial of Petition	34
Appendix D—Order Staying Mandate, and Notice	35-36

INDEX TO AUTHORITIES CITED

Cases

	Page
Boyd v. United States, 116 U. S. 616	21
Chambers v. United States, 237 Fed. 513	15
Fillippon v. Albion Vein State Co., 250 U. S. 76	14
Holmgren v. United States, 156 Fed. 439, 443, 445	15
Little v. United States, 73 F. 2d 865	15
Mattox v. United States, 146 U. S. 140, 13 S. Ct. 50	15
People v. Chambers, 279 Mich. 73, 271 N. W. 556	14
People v. Knapp, 42 Mich. 267, 3 N. W. 927	14
People v. Medcoff, 344 Mich. 108, 73 N. W. 2 537	18
State v. Burnetts, 80 Ariz. 208	15
United States v. Rakes, 74 Fed. Supp. 645	15
Wheaton v. United States, 133 F. 2d 522	15, 16

Constitution

Constitution of the United States:	
Article V	4
Article VI	4
Article XIV	5

Statutes

Rules of Criminal Procedure:	
Rule 31, Verdict	7
Rule 33, New Trial	7, 8
Rule 37(b), Petition for Review on Writ of Certiorari	8
U. S. C. A., Title 28, Sec. 1254 (1)	2
U. S. C., Title 18, Sec. 287	5, 9, 10
U. S. C., Title 18, Sec. 371	5, 9, 10
U. S. C., Title 18, Sec. 495	6, 9
U. S. C., Title 18, Sec. 1001	6, 9
U. S. C., Title 18, Sec. 2(a)	7, 9

Texts

	Page
American Law Reports:	
Vol. 17, pp. 609-622	15
Vol. 41, 2d, Sec. 3, pp. 233-236	15
Corpus Juris Secundum, Vol. 23, p. 1365, 53 Am. Juris. Trial p. 904	15

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1959

No.....

NORMAN G. ZACHARY and
EDWARD J. ZACHARSKI,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

To the Honorable Earl Warren, Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Your petitioners, Norman G. Zachary and Edward J. Zacharski, respectfully show:

I. OPINIONS BELOW

That appended hereto and made a part hereof are copies of the opinions below

(a) The opinion of the District Court of the United States for the Eastern District of Michigan, Southern Division. A copy is appended as Appendix A.

(b) The opinion of the Court of appeals is reported at 275 F. 2d 793. A copy is appended as Appendix B.

II. JURISDICTION

The judgment of the Court of Appeals was entered March 2, 1960. A petition for rehearing was denied March 28, 1960 (appendix C, p. 34) Order Staying Mandate upon Petition granted April 4, 1960 (appendix D, p. 35).

The jurisdiction of this Court is invoked under the provisions of Title 28, United States Code Annotated, Sec. 1254 (1).

III. QUESTIONS PRESENTED

1. Where a presumption of prejudice arises by an admitted unlawful communication with the jury by a court bailiff and when the record indicates no evidence rebutting this presumption, does the Court abuse its discretion in making a determination that no prejudice had resulted?

2. Can the affidavit of defendants concerning and relating to the unlawful communication with the jury made in

support of a motion for new trial which raise a presumption of prejudice be used by the Court as sufficient basis for a determination of no prejudice?

3. Where a jury reaches a verdict on some but not all of the counts in the indictments as it had a right to do under Rule 31(b) and the instructions of the Court and a court bailiff unlawfully communicating with the jury instructs them otherwise doesn't that fact require a Court ruling of prejudice as a matter of law?

4. Where defendants immediately advised their attorneys of the unlawful communication with the jury but the attorneys did not then tell the Court of the incident can it be held that the defendants negatively waived their constitutional right to a fair and impartial trial?

5. If an unlawful communication makes void or invalidates a verdict can the prejudiced defendants attack such verdict at any time?

6. Where during the course of trial the Government produces private papers in the form of copies of income tax returns obtained lawfully but under compulsion does this not incriminate defendants in violation of the Fifth Amendment of the United States Constitution and deny them a fair and impartial trial?

IV. CONSTITUTIONAL PROVISIONS, STATUTES, RULES INVOLVED

Constitutional Provisions

Amendments to Constitution of United States

Article V:

"Rights of persons charged with crimes; guaranty of life, liberty and property.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger, nor shall any person be subject to the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Article VI:

"Trials of criminal cases; rights of accused.

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district, wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusations; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defence."

Article XIV:

"Citizenship; security of persons and property, due process and equal protection clauses.

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Criminal Code Provisions

Title 18, U.S.C. Sec. 287, False, fictitious or fraudulent claims:

"Whoever makes or presents to any person or officer in the civil, military, or naval service of the United States, or to any department or agency thereof, any claim upon or against the United States, or any department or agency thereof, knowing such claim to be false, fictitious, or fraudulent, shall be fined not more than $10,000 or imprisoned not more than five years, or both. (June 25, 1948, ch. 645, Sec. 1, 62 Stat. 698, eff. Sept. 1, 1948.)"

Title 18, U.S.C., Sec. 371, Conspiracy to commit offense or to defraud United States:

"If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor. (June 25, 1948, ch. 645, Sec. 1, 62 Stat. 761, eff. Sept. 1, 1948.)"

Title 18, U.S.C., Sec. 495, Contracts, deeds, and powers of attorney:

"Whoever falsely makes, alters, forges, or counterfeits any deed, power of attorney, order, certificate, receipt, contract, or other writing, for the purpose of obtaining or receiving, or of enabling any other person, either directly or indirectly, to obtain ro receive from the United States or any officers or agents thereof, any sum of money: or

Whoever utters or publishes as true any such false, forged, altered, or counterfeited writing, with intent to defraud the United States, knowing the same to be false, altered, forged, or counterfeited: or

Whoever transmits to, or presents at any office or officer of the United States, any such writing in support of, or in relation to, any account or claim, with intent to defraud the United States, knowing the same to be false, altered, forged, or counterfeited—

Shall be fined not more than $1,000 or imprisoned not more than ten years, or both. (June 25, 1948, ch. 645, Sec. 1, 62 Stat. 711, eff. Sept. 1, 1948.)"

Title 18, U.S.C., Sec. 1001, Statements or entries generally:

"Whoever, in any matter within the jurisdiction of any department or agency of the United States

knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both. (June 25, 1948, ch. 645, Sec. 1, 62 Stat. 749, eff. Sept. 1, 1948.)"

Title 18, U.S.C., Sec. 2(a), Principals:

"Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal."

Rules of Criminal Procedure

Rule 31, Verdict:

"(a) Return. The verdict shall be unanimous. It shall be returned by the jury to the judge in open court."

"(b) Several defendants. If there are two or more defendants, the jury at any time during its deliberations may return a verdict or verdicts with respect to a defendant or defendants as to whom it has agreed; if the jury cannot agree with respect to all, the defendant or defendants as to whom it does not agree may be tried again."

Rule 33, New Trial:

"The court may grant a new trial to a defendant if required in the interest of justice. If trial was by the court without a jury the court may vacate the judgment if entered, take additional testimony and direct the entry of a new judgment. A motion for a new trial based on the ground of newly discovered evidence may be made only before or

within two years after final judgment, but if an appeal is pending the court may grant the motion only on remand of the case. A motion for a new trial based on any other grounds shall be made within 5 days after verdict or finding of guilty or within such further time as the court may fix during the 5-day period."

Rule 37(b), Petition for Review on Writ of Certiorari:

"(1) Petition. Petition to the Supreme Court for writ of certiorari shall be made as prescribed in its rules.

(2) Time of making petition. Petition for writ of certiorari may be made within 30 days after entry of the judgment or within such further time not exceeding 30 days as the Court or a justice thereof for cause shown may fix within the 30-day period following judgment. If the judgment was entered in a district court in Alaska, Hawaii, Puerto Rico, Canal Zone or Virgin Islands, the petition shall be deemed in time if mailed under a postmark dated within such 30-day period."

2.

V. STATEMENT OF FACTS

Defendants petition for a writ of certiorari to the United States Court of Appeals for the Sixth Circuit. This Court of Appeals entered a judgment on March 2, 1960 affirming the judgment of the District Court for the Eastern District of Michigan, Southern Division. Defendants had appealed from the verdict, judgment, sentence and Order denying defendants' motion to vacate and set aside verdict and to grant new trial. A petition for rehearing in the Court of Appeals was denied on March 28, 1960. An order of extension of time and staying of mandate for the purpose of filing petition for writ of certiorari on or before May 27 1960 was filed on April 4, 1960.

Facts Re: Trial and Proceedings

The defendants, Norman G. Zachary and Edward J. Zacharski, were indicted for violation of Title 18 of the U. S. Code, Sections 287, 495, 1001, 371 and 2(a). The indictment contained 139 counts. Counts 1 through 70 charged defendants under Section 287 alleging in substance that defendants presented or caused to be presented, and did aid and assist in presenting to the Treasury false, fictitious and fraudulent claims in the nature of income tax returns claiming income tax refunds. For each of 70 income tax returns a separate count is made in the indictment under Section 287 of Title 18 of the USC.

Counts 71 through 91 charged defendants with forgery and with the aiding and assisting in such forgery of United States Treasury checks (refund checks) by forged endorsement. Each refund check in Counts 71 through 91 is made a separate count in the indictment under Section 495, Title 18, USC (Forgery of government obligation) and Section 2(a), Title 18 USC. Counts 92 through 138 charged defendants with false, fictitious and fraudulent statements relating to Post Office Form 22 "Order to change address" directing transfer of mail. Each instance of alleged "Order to Change Address" was made a separate count in the indictment under Section 1001 and 2(a), Title 18, USC (5a). The final count in the indictment referred to as Count 139 charges Defendants with a conspiracy to violate a number of substantive offenses not more particularly described in the Count.

Prior to the return of the indictment, one of the defendants, Norman G. Zachary, made full and complete restitution to the U. S. of America. After the return of the indictment and with the advice of counsel, Mr. John Ray and Mr. Vince Fordell, and in presence of jury, Norman

G. Zachary entered a plea of guilty to Counts 1 through 138 and a plea of not guilty to Count 139 (Conspiracy). Edward J. Zacharski upon arraignment entered a plea of not guilty to each and every count in the indictment. Subsequently, Counts 71 through 138 were dismissed and as to those counts the court ordered a judgment of acquittal as to defendant, Edward J. Zacharski.

The defendants stood trial and the court and jury heard the testimony. Norman G. Zachary was tried on the conspiracy Count 139 and at the same trial Edward J. Zacharski was tried on Counts 1-70, substantive offenses of presentment or assisting in the presentment to the Treasury false, fictitious and fraudulent income tax returns, being Section 287, Title 18, USC and 2(a) Title 18 USC, and Count 139 of Conspiracy being Section 371, Title 18 USC.

Defendants made a motion for a directed verdict of acquittal on all counts and as to each defendant at the close of the Government's case. This motion based on lack of evidence of any involvement or sufficient proof of all charges in indictment was denied by the Court. The Court ruled that as to all counts the Government had produced sufficient evidence to carry the case to the jury.

At the close of the defendants' case, another motion for a directed verdict of acquittal on all counts and as to each defendant was made in open court. The Court ordered judgment of acquittal as to Edward Zacharski as to the offenses charged in Counts 71 to 138. The motion was denied as to Counts 1 to 70 as to Edward J. Zacharski and denied as to the conspiracy Count 139 as to both defendants (before jury).

The Court charged the jury and an officer was sworn before jury retired. The jury retired, deliberated and returned a verdict of guilty as to Edward J. Zacharski on

Counts 1 to 70 inclusive and Count 139 and a verdict of guilty as to Norman Zachary on Count 139.

Personal bond was continued pending sentence. Motion for new trial was filed, heard and denied.

Facts Re: Question of Unlawful Communication with Jury

On January 13, 1959, consent and order for substitution of attorneys for defendants was filed and entered. Theodore G. Albert and Norton N. Wisok were substituted for attorneys Vincent Fordell and John Ray who represented defendants at the trial. The following day, January 14, 1959, prior to sentence, defendants filed a motion to vacate and set aside verdict and to grant new trial. This motion was heard and argued prior to the sentencing of the defendants. The motion which was filed, in writing, contained new matter which was not found in a motion for new trial filed November 5, 1958, by prior attorneys for defendants. The defendants by their motion charged that they were substantially prejudiced and deprived of a fair trial because the bailiff in charge of the jury communicated with the jury and instructed them in the absence of the Court and without the presence of both defendants or their counsel to the effect that he (the bailiff) would not receive a verdict as to certain number of counts in the indictment, but that they (the jury) had to reach a verdict on all counts. Reference in the motion was made to the affidavits of the defendants supporting their motion.

The affidavits of the defendants say substantially that during the deliberations of the jury for their verdict, there was a knock from inside of the jury room door which was answered by the bailiff. Someone in the jury room was heard to say that the jury was ready, that they had brought

in a verdict on the first 70 counts. The bailiff was heard to say in a loud voice, "Oh, no, go back and bring in a verdict on all counts, you are not finished yet." And the bailiff was heard to repeat that they must go back in and bring in a verdict on all the counts.

The affidavit of defendant Zachary states that he inquired of the bailiff as to what had happened and the bailiff is quoted as having said, "They were ready on the first 70 counts and I told them that they were not ready and that they would have to bring in a verdict on all the counts." Also, that reporters from the Detroit News and Detroit Times were standing around the conference table in the Courtroom at the time the bailiff communicated with the jury. The affidavits indicate further that notice was given to counsel for the defendants (then engaged) but that nothing was done by them concerning the matter.

A short time later the jury brought in a verdict of guilty as to both defendants on all counts.

The motion to set aside verdict in paragraph 5 also stated that the verdict was invalid. After argument heard in open court and prior to sentencing defendants, the Court took the motion under advisement. Sentence was imposed. Norman Zachary was sentenced to five years imprisonment on each of the 139 counts. The terms to run concurrently. Edward J. Zacharski was sentenced to five years on each of the first seventy counts and on count 139. The terms to run concurrently. Notice of appeal was made and filed. Defendant Zachary was denied bail and defendant Zacharski's bail was set at $5,000. Judgment and Commitment on each defendant was filed.

Briefs on the motion to vacate verdict were filed with the Court. On March 26, 1959, the Court rendered its opinion denying the motion to vacate. The Government

conceded and admitted all of the allegations of the motion and statement in affidavits attached thereto. There was an offer of proof by defendants, but no testimony was taken. Order denying motion to vacate was filed pursuant to opinion of the Court on March 26, 1959. The Court of Appeals affirmed the District Court. A petition for rehearing was denied. The defendants petition for writ of certiorari.

VI. ARGUMENT

THE COURT OF APPEALS ERRED IN OVERLOOKING A FLAGRANT UNLAWFUL COMMUNICATION WITH THE JURY IN AFFIRMING THE DISTRICT COURT.

Petitioners cannot be reconciled to the admitted unlawful communication with the jury by the bailiff. There are involved here important accepted rulings which have been avoided. They are as follows:

1. Private communications, possibly prejudicial between jurors and third persons, or witnesses, or the officers in charge are absolutely forbidden and invalidate the verdict at least unless their harmlessness is made to appear.

2. The burden of establishing the harmlessness of the communication by competent evidence is upon the Government.

3. The fact that a communication between a bailiff and member or members of a jury takes place raises the presumption of prejudice against the defendants which can only be rebutted by competent evidence.

4. A Court record which fails to affirmatively disclose that no prejudice resulted from communication with the jury required that the Court must assume

that the error amounted to such an invasion of defendants' constitutional rights as to deprive him of a fair and impartial trial and invalidates the verdict.

The bailiff, in our case, at the request of a juror or jurors reported to the door of the jury room. A juror reported to the bailiff that the jury was ready and that they had reached a verdict on the first seventy counts. The bailiff refused to accept this result and ordered the jury to go back and bring in a verdict on all the counts.

It has been held that mere presence of the jurors and the custodian in the same room particularly the jury room during deliberations is reversible error.

People v. Knapp, 42 Mich. 267, 3 N. W. 927;
People v. Chambers, 279 Mich. 73, 271 N. W. 556.

Duties of the bailiff require that he guard the jury and it invalidates the verdict if he communicates and guides it. A bailiff shall not communicate with a jury.

In *Fillippon v. Albion Vein State Co.*, 250 U. S. 76, Justice Pitney said,

> "We entertain no doubt that the orderly conduct of trial by jury, essential to the proper protection of the right to be heard, entitles the parties who attend for the purpose to be present in person or by counsel at all proceedings from the time the jury is empaneled until it is discharged after rendering the verdict. Where a jury has retired to consider its verdict and supplementary instructions are required, either because asked for by the jury or for other reasons, they ought to be given either in the presence of counsel or after notice, and an opportunity to be present and written instructions ought not to be sent to the jury without notice to counsel and an opportunity to object. Under ordi-

nary circumstances and whenever practicable, the jury ought to be recalled to the courtroom, where counsel are entitled to anticipate and bound to presume, in absence of notice to the contrary, that all proceedings in the trial will be had."

Other Cases and Authority:

Mattox v. U. S., 146 U. S. 140, 13 S. Ct. 50;
See Anno.: *41 A.L.R.*, 2d Sec. 3, pp. 233-236;
Wheaton v. U. S., 133 F. 2d 522;
U. S. v. Rakes, 74 Fed. Supp. 645;
See *Case Note in 17 L.R.A. N.S.* pages 609-622 and cases therein cited;
Corpus Juris Secundum, Vol. 23, page 1365, 53 Am. Juris. Trial p. 904;
State v. Burnetts, 80 Ariz. 208;
Little v. United States, 73 F. 2 865;
Chambers v. United States, 237 Fed. 513;
Holmgren v. United States, 156 Fed. 439, 443, 445.

The Court of Appeals has overlooked and thus failed to apply ruling case precedent regarding communications with a jury by a court officer. The Court failed to apply *Wheaton v. U. S.*, 133 F. 2d 522 to the facts. The Court misapprehended the fact that the Government admitted the unlawful communication but totally failed to rebut the presumption of prejudice arising from the fact of the communication. The Court was not able to determine that rebuttal evidence had come in to meet the presumption when no such evidence was presented by the Government.

The motion for new trial and affidavits of appellants, standing by themselves, created and raised the presumption of prejudice that required rebutting testimony to overcome it. The affidavits of petitioners relating to the com-

munication were improperly construed by the Court as competent proof that the communication by the bailiff with the jury was not prejudicial. This is a finding that the Court could not make and doing so under the circumstances was an abuse of discretion.

In the *Wheaton* case, the Court said,

> "The Government having admitted that a communication between the bailiff and the jury had taken place, had the burden of establishing by competent evidence that the communication was in fact harmless. *The affidavit of the bailiff was not competent proof the communication was harmless and was not sufficient basis for the determination of the Trial Court that no prejudice had resulted.* We think the denial of the motion was under the circumstances an abuse of discretion." (Italics ours.)

An appeal the petitioners showed as the record indicates conclusively that the Government presented no affidavits, offered no proof, made no rebuttal and by brief admitted the fact of the communication. In the Wheaton case the Court, even though having the affidavit of the bailiff, said it was insufficient for the Court to rule no prejudice. The record, in the instant case, is void of competent evidence or proof rebutting the presumption. The abuse of discretion is even greater here than in the Wheaton case.

The Court of Appeals has obviously failed to consider that in each and every case cited by the Government the presumption of prejudice was rebutted *by the Government by competent evidence*. The cases cited by the Government do not apply in the instant case because the presumption of prejudice was *not* rebutted.

The Court cannot use the evidence which raises the presumption of prejudice and draw from it an inference sufficient to overcome the presumption.

The cases applied by the Court of Appeals have no application where the undisputed facts raise a presumption.

The admitted, unlawful communication raised a presumption of prejudice. The Court failed to note that this is a presumption of law. The Court in saying that it is a rebuttable presumption is granting that it is an inference of law which holds good until it is invalidated by proof or a stronger presumption. As a presumption of law (rebuttable) it forbids or dispenses with any ulterior inquiry. As we definitely have a *presumption of law* for consideration a certain inference (prejudice) must be made whenever the facts appear which furnish the basis of the inference. This required reasoning was avoided by the Court.

A rebuttable presumption of prejudice is evidence (motion for new trial and affidavits re: communication) which must be received and treated as true until rebutted by other testimony. Unless there is counter evidence to a rebuttable presumption the presumption holds good. The *only* inference the Court could draw from the fact of the communication was an inference of prejudice which is an inference of law.

The Court improperly inferred a fact of no prejudice from a fact raising a presumption which could give rise to only one inference, an inference of prejudice.

The Court of Appeals says:

> "There was no controversy as to the fact of that communication, but the inference which the Court drew that the communication as made was not prejudicial was an inference which the Court could properly make if it was entitled to consider

the motion at all. Such an inference is a finding of fact. We cannot perceive that this finding was clearly erroneous or that in making that ruling the Trial Court abused its discretion."

For the Court to reason that the District Court was entitled to draw an inference of no prejudice from a presumption of prejudice indicates that the Court failed to acknowledge the existing presumption and considered the District Court as merely deducing an inference from other facts. The presumption of prejudice is mandatory and a contrary inference cannot be simply deduced from it.

A presumption of law (as we have here) is a juridical postulate and being an inference of law the Court cannot find a contrary inference of fact based upon the inference of law. This would allow the Court to base one presumption or inference upon another which violates the rule of inference on inference.

The Court of Appeals is in an embarrassing position to say on the one hand that the motion for a new trial and the affidavits concerning the communication (admitted by the Government) raised the presumption of prejudice and then by use of the same motion and affidavits reason that the same are sufficient for a determination that as a fact the communication was not prejudicial.

The Court failed to give heed to *People v. Medcoff*, 344 Mich. 108, 73 N. W. 2 537, a Michigan case cited on page 29 of Brief of Appellant which indicates the law of Michigan that even if the trial court concludes that there had been no misconduct and even if the defendants have shown no prejudice, where the abrogation of defendants' fundamental rights are involved injury is *conclusively presumed*. Neither party, says the Michigan Court, is put to the burden of showing actual injury or prejudice or the lack of it.

Michigan is in effect ruling that, for example, an unlawful communication is prejudicial as a matter of law.

The Court failed to distinguish the instant case from other cited cases on the basis that in all of the cases relied upon by the Government the jury had not reached a verdict. In our case, when the unlawful communication was made, a verdict had been reached. (See affidavits of appellants attached to motion for new trial.) The jury had reached a verdict on counts 1-70 as permitted under Rule 31 (b). It does not require inquiry what that verdict was but the Court cannot avoid a ruling of prejudice as a matter of law for the denial of rights under the Rule and where specifically contrary to the instructions of the Court to the jury.

The Court in its opinion infers that there was an infirmity in the motion for new trial and that the District Court had nothing before it to consider because there was in effect no newly discovered evidence as appellants knew of unlawful communication prior to the original motion for new trial.

As the District Court did assume jurisdiction of the matter, it did so on the basis that what was before it was newly discovered evidence. The Court of Appeals cannot question the District Court's jurisdiction to entertain the motion and go behind the record. The Court records and the affidavits prove that the attorneys (original) failed to bring the matter of the communication to the attention of the Court or to otherwise complain of same. As to the petitioners it was newly discovered after trial when substituted attorneys were advised of it and hastened to bring it to the Court's attention. Once the petitioners advised their attorneys (original) of the communication they fulfilled all that was incumbent upon them. To require more

from the petitioners because of the failure of their attorneys (original) is not consistent with justice." Furthermore, justice dictates that a defendant should never be foreclosed from bringing a matter involving his liberty and his constitutional right to a fair and impartial trial to the attention and consideration of the Court. This would constitute an interference with fundamental rights. Petitioners furthermore, could not negatively or by stipulation waive their rights to a fair and impartial trial. The Court has failed to see the exception gleaned from the facts re: the newly discovered evidences rule." The matter of the so-called infirmity, if one such exists, was not before the Court and was not complained of or referred to by the Government in their brief or at any stage of the proceedings.

We perceive that the Court failed to take into consideration petitioners reason found in their motion for new trial i.e., that the verdict is invalid. We are unable to understand why the Court will not rule that when a bailiff instructs a jury contrary to his very oath that the Court does not consider the verdict rendered thereafter as being invalid. We ask, now, what Court rule prevents petitioners from attacking a void or invalid verdict at any time?

The Court improperly has disposed of the appeal relating to Norman G. Zachary on Count 139 because of the fact that he has pleaded guilty to Counts 1-138. It is obvious that Zachary was entitled to appeal, regardless, on Count 139. It is important to note that if, for any reason, appellants' position as to Count 139 was substantiated as to *either* Zachary or Zacharski, then and in that event there could not have been a conspiracy for a conspiracy requires the action of two or more.

THE COURT OF APPEALS ERRED AND COMPOUNDED THE ERROR OF THE DISTRICT COURT IN HOLDING IN EFFECT THAT PRIVATE PAPERS BROUGHT IN BY COMPULSION OR LAWFUL SEARCH AND SEIZURE CAN BE USED TO INCRIMINATE IN VIOLATION OF THE FIFTH AMENDMENT OF THE UNITED STATES CONSTITUTION.

The Court of Appeals has failed to read and properly understand the application of *Boyd v. United States*, 116 U. S. 616. The Boyd case did not refer to unlawful search and seizure but in fact is authority to the effect that if private papers are brought in by lawful search and seizure and compulsory production of such private papers incriminates in violation of the 5th Amendment of the United States Constitution. There has never been any claim that these private papers, copies of income tax returns are the product of unreasonable search or seizure. If Boyd is still the law and it should be the only evidence (circumstantial) connecting (Government Claim) petitioner Zacharski with any crime should have been ruled out. If an attorney objects, even if on the wrong basis, and the matter involves basic, fundamental, constitutional rights it should make no difference to the petitioner anad he should never be foreclosed from an objection relating to the denial of his rights.

CONCLUSION

This case is now presented to this Court and this Court should accept the opportunity to set the record straight regarding unlawful communications with a jury as admitted in the instant case. This court should clarify the incongruous situation which finds a ruling which permits

(a) Communication with a jury concerning instructions of the Court;

(b) Communication with a jury concerning a verdict;

(c) A bailiff receiving a verdict;

(d) Instructing a jury concerning case or verdicts;

(e) Bailiff to act or advise jury without authority or instructions of the Court;

(f) A Bailiff to do as much or more than the Court is able to do even while in violation of his oath.

This Court should accept the opportunity to state that the law certainly does not provide that a bailiff or any other officer of the Court with the power to receive any information relating to a verdict or the rendition of a verdict as is sworn to by affidavit in this case and which to date is uncontroverted. To say that an officer or a bailiff can tell a jury, intending to deliver a verdict, that it is not ready and that it must return and arrive at a verdict on all counts would make shambles of the rights of the defendants and would certainly deprive them of a fair and impartial trial. The deliberations of the jury after the bailiff ordered them back with instructions were no longer private.

Besides the question of the effect of the communication and the instructions given by the bailiff, is the serious question of the usurpation of the functions of the Court by the bailiff without the presence of the Court or counsel and not performed or done in open Court and on the record. It cannot be argued from the state of facts as they exist, that the defendants could in any way consent to the communication between the bailiff and the jury. It is the law that no consent will be implied and; consent, if any, must be affirmatively shown, and the same would be true even if counsel were present and knew of the communications being made.

This Court should also accept the opportunity to enunciate the strong rule of evidence that the private papers of an individual cannot be used to incriminate him even though obtained by the Government by lawful search and seizure or other legal compulsion.

Respectfully submitted,

FRANK E. HOOK,
Attorney for Petitioners.

APPENDIX A

OPINION OF THE COURT ON MOTION TO VACATE

The Court: In the case of the United States of America v. Norman G. Zachary and Edward J. Zacharski, criminal case No. 36,469, let the record show that Mr. Weldav representing the Government, is here, and Mr. Norton N. Wisok, representing the defendants, is here.

This matter is now before the Court on defendants' motion to vacate and to set aside the verdict, and to grant a new trial. The verdict of the jury was returned on October 31, 1958. A motion for new trial was filed on behalf of both defendants on November 5, 1958. That original motion for a new trial was orally argued by former counsel for the defendants, and was denied by an order of this Court dated January 6, 1959.

Prior to the imposition of sentence on the defendants there was a substitution of counsel who appeared at the time of sentence and moved for a new trial filing at that time the motion which is now before the Court for decision.

This second motion for a new trial is based on all of the grounds assigned as reasons in the original motion for a new trial, and in addition the motion assigned as a further reason, in substance, that the bailiff in charge of the jury communicated with the jury during their deliberations and in the absence of the Court. The motion was supported by two affidavits signed by each of the defendants, which are substantially the same in substance, and insofar as the issue in this case is concerned now on this motion, alleges that during the jury's deliberations the jury knocked on the jury room door, at least one of the jurors did, which was answered by the bailiff, and a juror then said to the bailiff that the jury had reached a verdict on the first 70 counts, to which the bailiff replied

to the juror that they were not yet finished and to go back and bring in a verdict on all counts.

The defendant Norman G. Zachary in his affidavit alleges that he heard those remarks, and that he thereupon talked with the bailiff who repeated to him in substance what had been said, and that he then went to his brother Edward J. Zacharski and told him what had happened, and that he then informed one of his attorneys, Mr. John Ray, of what had occurred, and then also informed the other attorney, Mr. Fordell, of the same thing. The affidavit of Edward J. Zacharski is substantially the same as that of his brother, the defendant Norman G. Zachary.

The Court has listened to oral arguments on this motion, following which counsel were asked and were given the opportunity to file briefs, which were filed. I want to thank counsel for the briefs.

The Court having already ruled on the first three grounds of the motion, which were substantially the same as the grounds of the original motion, it leaves for decision only the issue as to whether or not error was caused by the incident between the bailiff and the jury.

Of course, the bailiff had no right to communicate as he did with the jury. As to what allegedly occurred, as contended by the defendants, is not disputed by the Government.

The rule applicable to situations of this kind, as contended for by the defendants, which is also acknowledged by the Government to be the rule, is set forth in the case of Mattox v. U.S., reported in 146 U.S., at page 140, where the Court, among other things, uses the following language:

> "Private communications, possibly prejudicial, between jurors and third persons, witnesses or the officer in charge, are absolutely forbidden, and invalidate the verdict, at least unless their harmlessness is made to appear."

Of course, there has been no testimony submitted in connection with this motion; but it is obvious to the Court that the undisputed incident, what was said, is adequate for the Court to determine whether or not the incident is harmless, or whether it has been prejudicial to the rights of the defendants.

It also appears to be the rule, as set forth in the case of Chambers v. U.S., in 237 Fed., 513, that this rule as set forth in the Mattox case, creates a rebuttable presumption of prejudice.

The Court has carefully considered this incident, what was said by the bailiff, and what was said in the first instance by the juror, presumably the foreman of the jury, the response by the bailiff, and what subsequently occurred as set forth in the affidavits of the defendants,—from which the Court finds that the communication was harmless, and was not prejudicial to the rights of the defendants.

The Court also concludes that the failure of the defendants, or their counsel, all of whom were aware of what occurred, prior to the rendition of the verdict of the jury, constituted a waiver of the right to in any event complain, even though the remarks complained of might have been prejudicial. The Court finds authority for that in the case cited by the Government, the case of Ryan v. U.S., reported in 91 Fed., 2nd, 779, which, was a case very similar to the matter now before the Court.

This motion is, therefore, denied. An appropriate order may be submitted.

APPENDIX B

No. 13,919

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

NORMAN G. ZACHARY and EDWARD J. ZACHARSKI, *Appellants*, vs. UNITED STATES OF AMERICA, *Appellee*.	APPEAL from the District Court of the United States for the Eastern District of Michigan, Southern Division.

OPINION OF COURT OF APPEALS

Decided March 2, 1960.

(Filed March 2, 1960)

Before: CECIL, POPE and WEICK, Circuit Judges.
POPE, Circuit Judge.

An indictment was returned against the appellants, who are brothers, charging them, in 138 counts, with presenting fraudulent claims against the United States, (counts 1 to 70); with forging, uttering and publishing a number of United States Treasury checks, (counts 71 to 91), and with making false statements to the Post Office Department, (counts 92 to 138). A final count, No. 139, charged the appellants with conspiring to present to the Treasury Department false and fraudulent tax returns claiming refunds due.

At the outset of the trial the appellant Norman Zachary pleaded guilty to counts 1 through 138 inclusive. Appellant Edward Zacharski pleaded not guilty on all counts. The defendants were tried together; Edward Zacharski being tried on all substantive counts as well as on the con-

spiracy count, and Norman Zachary on the conspiracy charge alone. During the course of the trial the Court entered a judgment of acquittal as to Edward Zacharski on counts 71 to 138, inclusive. The jury found him guilty on counts 1 to 70, inclusive, and count 139; Norman Zachary was found guilty on count 139.

Each defendant was sentenced to imprisonment for a period of five years on each count, that is to say, Edward Zacharski on counts 1 to 70 inclusive, and 139, and Norman Zachary on each of counts 1 to 139 inclusive. All of said terms of imprisonment were to run concurrently.

Upon this appeal appellants contend first that the trial court should have granted their motions for acquittal because of the insufficiency of the evidence, and second, that the Court should have set aside the verdict because of a communication between the bailiff and a member of the jury at a time when the jury had retired and before it had returned its verdict.

So far as the appellant Norman Zachary is concerned, he is in no position to complain with respect to these matters. As indicated, he was tried on the conspiracy count alone,—count 139. He pleaded guilty to counts 1 to 138, inclusive. On each of these counts he was sentenced to a term of five years. No error relating to his trial on count 139 need be considered by us since the sentences upon all counts run concurrently with the sentence on the counts with respect to which he pleaded guilty. Sinclair v. United States, 279 U. S. 263, 299; Hirabayashi v. United States, 320 U. S. 81; Pinkerton v. United States, 328 U. S. 640; Lawn v. United States, 355 U. S. 339, 359, 362.

So far as Edward Zacharski is concerned, his argument that there was insufficient evidence to sustain a verdict against him is in turn based upon his contention that certain pencilled copies of the tax returns of one Braeob were improperly admitted and received in evidence. He asserts that without those copies there was insufficient evidence to connect him with the filing of the 70 false tax returns which were the basis of the first 70 counts of the indictment.

The evidence disclosed that these 70 returns, showing large overpayment of taxes through withholding and consequent substantial refunds payable by the Government, were filed in the names of 70 completely fictitious and nonexistent persons. The Post Office records showing that purported requests for changes of address had been filed with it in the names of these 70 fictitious taxpayers changing the addresses to 20252 Van Dyke, Detroit, Michigan. The result of these changes of address would be that the refund checks, if issued, would be mailed to that address. It was the office and place of business of the two defendants. After evidence indicating that some one at that address was responsible for the fictitious returns, a search warrant authorizing search of that place was issued together with a warrant for the arrest of Edward Zacharski. The officers proceeded to search the premises and arrest Zacharski who, upon such arrest, volunteered statements indicating his complete familiarity with the false returns and anticipated refunds.

In that search the officers found the penciled copies of the Bracob tax returns. These were shown to be in the handwriting of Edward Zacharski. Bracob was an actual taxpayer who had made a return which was the basis for substantial tax refund to him. The significance of the penciled copies was not merely that they were in the handwriting of Edward Zacharski, but that a comparison of them with the 70 fictitious returns would warrant an inference that they had been the model from which the false returns had been copied, or on which they were modeled.

The contention is that these copies were inadmissible because their seizure and introduction in evidence amounted to an unlawful seizure and compulsory production of a party's private papers to be used against him in a criminal case in violation of the Fourth and Fifth Amendments as expounded in Boy v. United States, 116 U. S. 616.

There are several reasons why this contention cannot be made here. In the first place, no such objection was interposed by Zacharski at the time these penciled copies

were offered and received. They were objected to but upon an entirely different ground.[1] In the second place, a claim of unreasonable search or seizure such as this may not be urged where the party fails to move to suppress the evidence in question prior to the time of trial. United States v. Sheba Bracelets, 2nd Cir., 248 F. 2d 134, 142 to 143, and cases there cited; Criminal Rule 41 (e). We fail to perceive any reason why these copies, strong circumstantial evidence against Zacharski, should be deemed the product of unreasonable search or seizure any more than any other evidence or matter which might have been obtained through the duly authorized search of the defendant's premises.

The question concerning an alleged prejudicial and improper communication between the bailiff and a member of the jury arose in the following manner:—the jury's verdict was returned on October 31, 1958. Within the five days allowed for such a motion defendants moved for a new trial on the grounds that the Court should have ordered an acquittal, the verdict was contrary to the weight of the evidence, and that the verdict was not supported by substantial evidence. That motion was heard and denied on January 5, 1959. On January 14, 1959, defendants filed a so-called "Motion to Vacate and to Set Aside Verdict and to Grant New Trial" through new counsel substituted for those who represented them at the trial. Made parts of the motion were the affidavits of the two defendants.

The affidavit of Norman Zachary stated that on the last day of the trial he was sitting in the courtroom when he heard knocks on the jury room door; that the bailiff ran to the door and opened it; that he heard the bailiff say "Yes" and a woman's voice replied that the jury is ready; that they had brought in a verdict on the first 70 counts; that the bailiff said in a louder voice: "Oh no, go back and

[1] "The Court: What is the objection? Mr. Fordell: Because there is no proof that those figures that appear on that copy there were figures that were made up by Mr. Zacharski. Just some handwriting on those copies."

bring in a verdict on all counts, you are not finished yet. Oh no, go on in back, you have to bring a verdict on all counts." That thereafter affiant had asked the bailiff what happened and the bailiff recounted what he had said to the juror. The affidavit states that thereupon Zachary told his brother what had happened. The affidavit also states that he told his attorney what had happened. The affidavit of Edward Zacharski is to the same effect; that both he and his brother and their attorney learned of this incident at the time it happened or shortly thereafter.

Since the matters set out in this motion to vacate and set aside the verdict would not constitute any basis for a collateral attack upon the verdict or the judgment under Sec. 2255 of Title 28, and since the motion was filed long after the five day period permitted by Rule 33 F. R. Crim. Proc. in other cases, if it had any standing at all it must be as a motion for new trial on the ground of newly discovered evidence. Rubenstein v. United States, 10 Cir., 227 F. 2d 638. It is plain that appellants must have treated it as such for they filed a separate notice of appeal from the order denying their motion. Such an order is appealable. Balestreri v. United States, 9 Cir., 224 F. 2d 915. But as the case just cited said with respect to such a motion, quoting from the Eighth Circuit, "The evidence must be in fact newly discovered, i. e., discovered since the trial." See in accord, Pitts v. United States, 9 Cir. 263 F. 2d 808, 810; United States v. Costello, 2d Cir., 255 F. 2d 876, 879; United States v. Howell, 3d Cir., 240 F. 2d 149, 159; United States v. Marachowsky, 7 Cir., 213 F. 2d 235, 238.

The motion here showed on its face that the facts on which it was based came to the attention of the defendants and their counsel before the verdict of the jury was returned; it is plain therefore that the motion cannot qualify as one for a new trial based on newly discovered evidence. The proper time to have presented these matters to the Court was when the first motion for a new trial was made on November 5, 1958. Appellants simply failed to utilize the one available remedy they had.

When the trial Court considered his motion to vacate the sentence, it had nothing before it upon which it was authorized to act; also when the Court did undertake, notwithstanding this infirmity in the motion, to pass upon its merits, it found as a fact that the communication from the bailiff to the juror was not prejudicial. There was no controversy as to the fact of that communication, but the inference which the Court drew that the communication as made was not prejudicial was an inference which the Court could properly make if it was entitled to consider the motion at all. Such an inference is a finding of fact.* We cannot perceive that this finding was clearly erroneous or that in making that ruling the trial Court abused its discretion.

Since we find no error in the record, the judgment and the order are affirmed.

---

*"Even where there is no dispute about the facts, if different reasonable inferences may be drawn from the evidence, we are forbidden to disturb the findings based on such inferences unless they are clearly erroneous." Central Ry. Signal Co. v. Longden, 7 Cir., 194 F. 2d 310, 318. Accord: Rich v. Pappas, 6 Cir., 229 F. 2d 308, 313.

APPENDIX C

No. 13,919

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

NORMAN G. ZACHARY and EDWARD J. ZACHAFSKI, *Appellants,* vs. UNITED STATES OF AMERICA, *Appellee.*	PETITION DENIED (Filed March 20, 1960)

Before: CECIL, POPE and WEICK, Circuit Judges.

Appellants' petition for rehearing is denied.

Lester L. Cecil,
Martin L. Pope,
United States Circuit Judges.

APPENDIX D

Office of the Clerk

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Cincinnati 2, Ohio

April 4, 1960.

Messrs. Wisok & Albert,
1027 Penobscot Building,
Detroit 26, Michigan.

Hon. Charles K. Rice, Assistant Attorney General,
United States Department of Justice,
Washington 25, D. C.

Hon. Fred W. Kaess,
United States Attorney,
Detroit 26, Michigan.

Re.: Norman G. Zachary, et al. v.
United States of America.
No. 13,919.

Gentlemen:

A order was entered today staying mandate until May 27, 1960, in the above styled cause and provides further that if application for writ of certiorari is filed in the Supreme Court within said time then the stay shall operate until the final disposition of the case by the Supreme Court.

Yours very truly,

Carl W. Reuss,
Clerk.
Mary M. McAfee,
Deputy Clerk.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

NORMAN G. ZACHARY and EDWARD J. ZACHARSKI, *Appellants*, vs. UNITED STATES OF AMERICA, *Appellee*.	No. 13,919

ORDER STAYING MANDATE

(Filed April 4, 1960)

On motion of counsel for Norman G. Zachary and Edward J. Zacharski, appellants in the above entitled cause, and good reason appearing therefor,

It Is Now Here Ordered, that the issuance of the mandate of this Court in the above entitled cause be, and the same is hereby stayed pending application by the appellants to the Supreme Court of the United States for a writ of certiorari, provided said application is made on or before Friday, May 27, 1960.

/s/ Charles C. Simons,
Judge of the U. S. Court of Appeals
for the Sixth Circuit.

Dated: March 30, 1960.